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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 998

TREY PACKING, INC., GOL-PACK CORPORATION, NATIONAL FROSTED FOOD CO., INC.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

ADDITIONAL APPENDIX

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APPENDIX D

Decision and Order of the National Labor Relations Board

On February 28, 1968, Trial Examiner John P. von Rohr issued his Decision in the above-entitled proceeding finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and General Counsel filed exceptions to the Decision of the Trial Examiner and supporting briefs and the Respondent filed a brief in answer to the exceptions and brief of the General Counsel.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner,[1] as herein modified.

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[1] Exceptions have been taken to some of the credibility findings of the Trial Examiner which were based to a large extent on demeanor of witnesses. It is the Board's policy, however, not to overrule a Trial Examiner's resolutions with respect to credibility unless, as is not the case here, the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C. A. 3).

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For reasons fully set forth in his Decision, we agree with the Trial Examiner's conclusions that Respondent violated Section 8(a)(1), (3), and (5) of the Act by discharging employees Hughes and Robinson and curtailing the trucking operations at Respondent's Oneida, New York, facility for the purpose of depriving the employees of rights guaranteed by Section 7 of the Act and to avoid dealing with the Union as majority representative of its truckdrivers.

In fashioning a remedy for the violations, however, the Trial Examiner recommended that Respondent be permitted to choose between alternative remedies of restoring the driving jobs eliminated from the Oneida facility and reinstating Robinson and Hughes therein, or reinstating them with travel and moving expenses at its new Quincy facility in Watertown, Massachusetts, discharging if necessary truckdrivers hired subsequent to the discrimination. General Counsel has excepted to this remedy and urges the Board to order Respondent to restore the truckdriving jobs at the Oneida facility and offer the discriminatees reinstatement at that facility.

Respondent was actively considering expanding and decentralizing the distribution phase of the Oneida operation when the Union organizational activities herein began. However, plans had not yet been formalized. In fact, negotiations for the Massachusetts facility were not commenced until after the discharges herein, and the trucking operations at the Quincy (Watertown), Massachusetts, and Secaucus, New Jersey, facilities did not become operational until 2 or 3 months after the termination of Robinson and Hughes. During the interval Respondent used common carriers and other improvised arrangements,

including utilization of the machanic and his truck to handle deliveries that normally would have been made by the two discharged employees. Even after the decentralization was effected, Respondent did not close the Oneida distribution operation but merely shifted to Quincy and Secaucus some of the deliveries formerly handled by the Oneida facility. Indeed, Respondent testified that the Quincy and Secaucus facilities have taken over only about 50 customer drops that were eliminated from the Oneida operation.[2] Respondent still distributes its own products processed at Oneida and relays products received from the Union City, New Jersey, processing plant to the distribution points.

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[2] On direct examination, Respondent's Secretary Lawrence Goldwasser testified that following the discharges of Robinson and Hughes:

> . . . Instead of one man riding all the way to Boston for a straight eight hours with fifty drops on and coming back three or four days later. . . . *The new change was to do our shipping with common carrier.* . . . So we eliminated some fifty drops per truck to two drops per truck and now coming back with a return load going down to Gol-Pak and driving a load back.

Goldwasser further testified [that due to the operational changes] New England drops [presently] are made out of Boston and an occasional major drop "almost the whole truck" is made out of Oneida. Regarding the changes, neither of Respondent's witnesses testified with clarity. When pressed by General Counsel for more details of the eliminated stops, L. Goldwasser stated, "Here's my point, when I say eliminate fifty stops, *I mean fifty stops would have been peddled by one of the drivers and is now shipped by common carrier.* . . ." (Emphasis supplied.)

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While it is possible that Respondent for economic reasons, may eventually have curtailed its Oneida truck delivery operations and shifted to common carrier and decentralized deliveries, the record clearly establishes that it took the action herein to evade its statutory obligation, which would have included bargaining about the transfer of delivery operations and the effects upon employees. Had it done so, the employees not only may have been given an opportunity to transfer to one of the new facilities or to nondriving work at Oneida, but may have retained the work assigned to common carrier. In any event, it must be presumed they would have retained their jobs until Respondent's bargaining obligations were fulfilled. Respondent offered no testimony of a decline of business at Oneida. In fact, the need for additional storage space which Respondent considered prior to the union demand would seem consistent with Respondent's testimony of a general increase in its business. Nor did Respondent offer any evidence which would tend to show that a resumption of truck delivery operations at Oneida would cause any considerable change in its business or subject Respondent to undue financial hardship. Respondent still has possession of the rented trucks formerly used at the Oneida facility and there is no evidence that if Respondent ceased using common carriers and other makeshift arrangements, it would not have adequate truckdriving work for Robinson and Hughes at this facility.[3]

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[3] Absent a more definitive explanation or evidence to the contrary, the following exchange at the hearing between General Counsel and Goldwasser tends to show that in addition to having

(*Footnote continued on following page*)

Under these circumstances, redress of the 8(a)(3) and (5) violations warrants restoration of the *status quo ante*. Accordingly, we shall order that Respondent restore the jobs eliminated from its Oneida facility and offer to Robinson and Hughes reinstatement to their former positions,[4] and that Respondent fulfill its statutory obligation to bargain with the Union concerning terms and conditions of employment. This order will not preclude effectuation of operational changes affecting the jobs, provided Respondent satisfies its obligation to bargain with the Union about such changes and does not make operational changes for a discriminatory motive.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as herein modified, and hereby orders that

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(*Footnote continued from preceding page*)

a need of drivers for transporting products from Oneida to its new distribution centers, Respondent is still using common carriers to handle stops eliminated from Oneida:

> Q. (By General Counsel) Which runs were they that were stopped? A. New England runs.
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> • • •
>
> Q. Who makes the deliveries now? A. Common carrier.
> Q. From where? A. New Jersey. Some of the stops are made from the Boston area.

[4] *Preston Feed Corporation*, 134 NLRB 629, enfd. 309 F. 2d 346 (C. A. 4). Cf. *Valley Forge Flag Company*, 152 NLRB 1550, 1567; *Dairy Farmers Transfer*, 158 NLRB 78.

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Respondent, Trey Packing, Inc.; Gol-Pak Corporation; National Frosted Food Co., Inc., Oneida, New York, their officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as modified below:

1. Insert in paragraph 1(c) of the Recommended Order after the words "conditions of employment" the phrase "and from unilaterally making operational changes which affect the jobs of unit employees without prior bargaining with the above-named Union or any other union its employees may select as their exclusive bargaining representative about such changes and the effects such changes may have on employees' jobs."

2. In paragraph 2(a) of the Recommended Order, delete the words "Offer to Robert Robinson and Robert B. Hughes" and insert

> "Restore to the Oneida, New York facility the jobs formerly held by Robert Robinson and Robert B. Hughes and offer them."

3. Delete from paragraph 2(e) of the Recommended Order the reference to Watertown, Massachusetts.

4. Insert the following paragraph after the sixth indented paragraph of the Notice to All Employees:

> WE WILL NOT make operational changes which affect the jobs of unit employees without bargaining with the above-named Union or any other union employees have selected as their exclusive bargaining representative about such changes and the effect such changes may have on their jobs.

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5. In the next to last indented paragraph in the Notice to All Employees, delete the words "We Will offer Robert Robinson and Robert B. Hughes" and insert

> "We Will restore to our Oneida, New York, facility the jobs formerly held by Robert Robinson and Robert B. Hughes, and offer them."

6. Add the following immediately above the double line at the bottom of the Notice to All Employees:

> NOTE: We will notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

Dated, Washington, D. C., June 26, 1968.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)